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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-445

RONALD A. CONNOR, a minor, by his guardian, PEARL CONNOR, and PEARL CONNOR, parent of said minor, in her own right,
Plaintiffs and Respondents,

vs.

DUQUESNE BREWING COMPANY OF PITTSBURGH,
Original Defendant and Petitioner,

vs.

WILLIAM BOOKAMEYER,
Additional Defendant.

No. 151 Allocatur Docket

CHARLES F. HARVEY, a minor, by his guardian, BARBARA A. HARVEY, mother of said minor, in her own right,
Plaintiffs and Respondents,

vs.

DUQUESNE BREWING COMPANY OF PITTSBURGH,
Original Defendant and Petitioner,

vs.

WILLIAM BOOKAMEYER,
Additional Defendant.

No. 151 Allocatur Docket

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF THE DUQUESNE BREWING COMPANY OF PITTSBURGH

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INDEX.

PAGE

Petition for Writ of Certiorari on Behalf of the Duquesne Brewing Company of Pittsburgh 1
Reference to Reports of Opinions Delivered in the Courts Below 2
Jurisdiction 2
Questions Presented 2
Constitutional Provision Involved 3
Statement of the Case 3
Argument 9
(a) Does the Order of the Supreme Court of Pennsylvania at No. 151 Allocatur Docket remanding the two *Duquesne Brewing Company* cases back to the Court of Common Pleas of Allegheny County deny the Petitioners equal protection of the laws under the Due Process Clause of the United States Constitution by reason of the failure of the Supreme Court to afford the cases at No. 151 Allocatur Docket equal treatment to a similar companion case at No. 152 Allocatur Docket? 9
Exhibit "A"—Opinion in Budget Laundry Company v. Munter 14
Exhibit "B"—Order, June 19, 1972 60
Exhibit "C"—Orders 61
Exhibit "D"—Order, May 2, 1972 63
Exhibit "E"—Petition for Reconsideration 65

Table of Cases.

In re: Brown, 439 F. 2d 47 (Cir. Ct., 1971) 9
Budget Laundry Company v. Munter, *et al.*, at 2362 July Term, 1968 .....2, 4, 6, 7, 8, 9, 10, 11, 12, 13
Republic Pictures Corporation v. Kappler, 56 S. Ct. 523, 327 U. S. 757 (1946) 9

Statute.

28 U. S. C. A. § 1257 2

Constitution.

PAGE

Equal Protection Clause of the Fourteenth Amendment 9
United States Constitution:
Amendment XIV, Section 1 3
Due Process Clause 2,9

Rule.

PARCP, Rule 218 4

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No. 151 Allocatur Docket

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF THE DUQUESNE BREWING COMPANY OF PITTSBURGH

Reference to Reports of Opinions Delivered in the Courts Below

(a) Opinion of the Honorable Silvestri Silvestri of the Court of Common Pleas of Allegheny County, Pennsylvania, filed June 30, 1971 at No. 2362 July Term, 1968, No. 1017 and 2039 April Term, 1970 involving the two *Duquesne Brewing Company* cases subject to this Petition and the *Budget Laundry Co. vs. Munter* case also discussed in this Petition. Opinion is attached hereto and marked "Exhibit A". (R-112a).

Jurisdiction

The order sought to be reviewed was entered by the Supreme Court of Pennsylvania at No. 151 Allocatur Docket on June 19, 1972. The Order is attached hereto and is marked "Exhibit B".

The Petitioners believe and aver that 28 U. S. C. A. § 1257 confers upon this honorable Court jurisdiction to review the Order in question by way of Writ of Certiorari.

Questions Presented

(a) Does the Order of the Supreme Court of Pennsylvania at No. 151 Allocatur Docket remanding, without opinion, the two *Duquesne Brewing Company* cases subject to this Petition back to the Court of Common Pleas of Allegheny County deny the Petitioners equal protection of the laws under the Due Process Clause of the United States Constitution by reason of the failure of the Supreme Court to afford the cases treatment equal to that afforded the *Budget Laundry* case at 152 Allocatur Docket, a companion case involving exactly the same legal and factual issues.

Constitutional Provision Involved

AMENDMENT XIV, SECTION 1

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws."

Statement of the Case

The two *Duquesne Brewing Company* cases directly involved in this Petition arise out of the same circumstances. On October 19, 1969, the minor Plaintiffs were passengers in an automobile that collided with a coal pile on the property of the Duquesne Brewing Company on the South Side of the City of Pittsburgh, Pennsylvania. As a result of the collision, the minor Plaintiffs, by their guardians, filed suit for personal injuries in February, 1970, and the cases were placed at issue for trial during the latter part of January, 1971. Attorney Murray Love of the Bar of Allegheny County, Pennsylvania, was listed as trial counsel for the Plaintiffs in regard to both the two cases against the Duquesne Brewing Company. On Wednesday, January 27, 1971, Attorney Love was called by the Court of Common Pleas of Allegheny County, Pennsylvania, to pick a jury and immediately proceed to trial on both the Plaintiffs' cases in accordance with the Trial Policy of the Court, *infra*, "Exhibit C". Mr. Love did not appear to pick the jury and consequently, the jury was picked in his absence and the case proceeded to trial without Mr. Love.

By reason of Mr. Love's and the Plaintiffs' failure to appear, a compulsory non-suit was entered against the Plaintiffs in both cases under PARCP, Rule 218.

Attorney Love, as representing the Plaintiffs, argued to the Court *en banc* that the compulsory non-suit should not have been entered in accordance with the then-governing local Trial Policy on the basis his clients had a constitutional right to designate him as the lawyer to try their case, that there were no experienced trial counsel in his office capable of handling the complex issues involved in the instant two cases, and that the Court of Common Pleas of Allegheny County should have granted him a one-week continuance so that he could finish his involvement in the United States District Court for the Western District of Pennsylvania in time to take up the within two cases in the Court of Common Pleas of Allegheny County.

At the same time the two cases directly involved herein were ordered to trial on January 27, 1971, there was an additional case named *Budget Laundry Company vs. Munter et al.*, at 2362 July Term, 1968, now 152 Allocatur Docket, that was also ordered to trial on or about January 27, 1971. In the latter case, the same Attorney Murray Love was listed as trial counsel for Munter in defense of the action brought by the *Budget Laundry Company.* Again, Attorney Love failed to show to pick the jury, and again the matter went to trial without counsel. A verdict was entered in favor of the Plaintiff and against Attorney Love's client in the case. Mr. Love offered similar reasoning for failure to show to pick the jury and proceed to trial in the *Budget Laundry* case as he did in the two cases involving the Petitioner herein, the Duquesne Brewing Company of Pittsburgh.

During 1971 and now, trials in the Court of Common Pleas of Allegheny County were governed by the following rules:

"(1) Counsel as listed for the case must be available and ready to try the case at the time it is called;

(2) If listed counsel is not available for whatever reason, then they must be substituted for;

(3) If a firm does not have sufficient trial counsel to substitute, provision must be made to obtain other trial counsel;

(4) If listed counsel is not available and no substitute provided, the case will proceed without counsel;

(5) The foregoing will apply regardless of the direction of desires of the corporate or individual client.

When the list of cases is first published, it is the the duty of your firm to double-check the readiness of your cases as to bills, reports etc. and the availability of witnesses, doctors, exports, etc. involved in the case.

When it is ascertained that any person necessary for the trial of the case may not be available during the trial term, then a deposition for use at trial must be taken forthwith. No continuances will be granted for out-of-town business trips, vacations, etc. or any absence during trial terms of either counsel or persons necessary to the trial of the case or failure to comply with any of the foregoing.

When counsel is called to pick a jury, failure to appear within 15 minutes will result in the Court picking the jury and the case being sent to trial without counsel.

Signed,

HON. SILVESTRI SILVESTRI,
Calendar Control Judge."

Throughout the proceedings in the Courts below, counsel for the Duquesne Brewing Company and counsel for the Plaintiff in the *Budget Laundry* case, argued that the compulsory non-suit in regard to the *Connor* cases and the verdict in relation to the *Budget Laundry* case should be upheld by the Courts by reason of the fact Attorney Murray Love blatantly violated the Trial Policy of the Court of Common Pleas of Allegheny County by:

(1) Not having counsel listed for the case available to try the case at the time it was called;

(2) Not substituting for listed counsel;

(3) Making no provision to obtain other trial counsel in the event the firm did not have sufficient trial counsel to substitute.

Arguments on the Motion of Attorney Love for the removal of the compulsory non-suits in relation to the two *Duquesne Brewing Company* cases, and the Motion for a new trial in relation to the *Budget Laundry* case, were held simultaneously during the late Spring of 1971 after which Judge Silvestri Silvestri filed his Opinion and Order on June 30, 1971, denying all of Attorney Love's Motions. The Court, by Judge Silvestri, stated "These motions raise fundamental questions as to the power and ability of this Court to establish a calendar of cases and the extent to which it can enforce that calendar and control the movement of cases." The Court felt that its power to control the calendar superseded and was more important than Attorney Love's claim of privilege to arrange his trial schedule at his convenience.

The firm of Sikov and Love then took appeal directly to the Superior Court of Pennsylvania on all three cases at Superior Court Docket No. 543 April Term, 1971, No.

544 April Term, 1971 and No. 546 April Term, 1971. Arguments were held before the Superior Court on all three cases on November 11, 1971 and then during January, 1972 the Superior Court affirmed the Order of the Court of Common Pleas of Allegheny County *per curiam* and without opinion on all three cases, Orders attached hereto and marked "Exhibit C". In response to the Orders of the Superior Court of Pennsylvania, Attorney Love then took similar appeals on behalf of his clients, to the Supreme Court of Pennsylvania for an allowance of allocatur.

On May 2, 1972, the Supreme Court of Pennsylvania in regard to the two *Duquesne* cases, ordered and decreed, without opinion, that the Petition for Allocatur be granted and the record be remanded to the trial Court with directions to remove the compulsory non-suit and permit the case to proceed according to law. Order attached and marked "Exhibit D." Contrary to the result in the *Duquesne Brewing Company* cases, the Court in May of 1972, ordered, without opinion, that the *Budget Laundry Co.* case be set down for argument before the Supreme Court and not be remanded back to the Court of Common Pleas of Allegheny County, as was the fate of the two *Duquesne Brewing Company of Pittsburgh* cases.

The thrust of your Petitioners' Complaint is that all three of the cases, the two *Duquesne Brewing Company* cases at No. 151 Allocatur Docket, and the *Budget Laundry* case at No. 152 Allocatur Docket, basically contain the same or similar facts, circumstances and the same questions of law and therefore, should not have been treated differently by the Supreme Court of Pennsylvania.

Your Petitioner first raised the equal protection constitutional issue herein in its Petition for Reconsideration filed after the May 2, 1972 Order of the Supreme Court

in regard to the two *Duquesne Brewing Company* cases at Allocatur Docket No. 151. The Petition for Reconsideration of your Petitioners attached hereto and marked "Exhibit E". In response to your Petitioners' Petition for Reconsideration, the attorneys for the Plaintiffs filed an Answer wherein they admitted the similarities between the *Duquesne* cases and the *Budget Laundry* case, and urged the Court not to overturn its Order of May 2, 1972, but to "solve the Defendants' dilemma" by giving argument and rendering an Opinion on the companion *Budget Laundry* case which, by this time, had been granted allocatur and subsequently set for argument, which has not yet taken place. Counsel for the Plaintiffs stated in their Answer as follows:

> "(b) Inasmuch as the issue involved in the *Budget Laundry Co.* case and the within captioned matters are essentially the same, it is submitted that this Court can resolve defense counsel's dilemma as well as the dilemma of the other members of the Bar of Allegheny County by its decisions to be rendered in the *Budget Laundry Co.* case which now bears No. 152 on the Allocatur Docket.
>
> (c) The full arguments and briefs submitted by both parties have been previously submitted in the within matter. The parties hereto have had equal protection of the law and a resolution of the trial judge's policy can adequately be set forth in the *Budget Laundry Co. vs. Munter* case pending at No. 152 Allocatur Docket."

It is argued by the Duquesne Brewing Company, your Petitioner, at No. 151 Allocatur Docket, that if the facts, issues and law are similar in all three companion cases, the Supreme Court denied the Duquesne Brewing Company equal protection of the laws by its failure to also grant your Petitioner similar treatment to the parties in the *Budget Laundry Co.* case, *i.e.* briefs and argument before the Supreme Court of Pennsylvania.

ARGUMENT

(a) Does the Order of the Supreme Court of Pennsylvania at No. 151 Allocatur Docket remanding the two *Duquesne Brewing Company* cases back to the Court of Common Pleas of Allegheny County deny the Petitioners equal protection of the laws under the Due Process Clause of the United States Constitution by reason of the failure of the Supreme Court to afford the cases at No. 151 Allocatur Docket equal treatment to a similar companion case at No. 152 Allocatur Docket?

Your Petitioners believe the Supreme Court of the Commonwealth of Pennsylvania denied it equal protection of the laws on the basis of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, *supra* and cases decided thereunder indicate that "equal protection of the law" implies that all litigants similarly situated may appeal to the Courts for relief under a like condition and without discrimination. And further, that due process does not require necessarily a right to appellate review, but once extended, there may not be imposed upon your Petitioner discriminatory limitations which violate the right to equal protection of the laws. See *Republic Pictures Corporation vs. Kappler*, 56 S. Ct. 523, 327 U. S. 757 (1946); *In re: Brown*, 439 F. 2d 47 (Cir. Ct., 1971).

Your Petitioners believe that it was similarly situated with the parties involved in the *Budget Laundry* case and that the parties in both cases reached the Supreme Court of Pennsylvania under like conditions and therefore, your Petitioners were treated in a discriminatory fashion by having its matter remanded without opinion, while the Court also without opinion, granted argument on the *Budget Laundry* case.

The similarity of the situations of the parties is as follows:

(1) The three cases were personal injury cases that reached the Allegheny County Court of Common Pleas list for trial at approximately the same time, being the week of January 27, 1971.

(2) The same judge, being Silvestri Silvestri of the Court of Common Pleas of Allegheny County, ordered Attorney Murray Love, who was listed to try the cases, to comply with the trial policy or else face the consequences as dictated by the same trial policy.

(3) The same Allegheny County Court of Common Pleas trial policy governs both cases.

(4) The same attorney, being Attorney Murray Love, failed to pick a jury or appear for trial in either case.

(5) The failure of Attorney Murray Love to pick a jury or appear for trial occurred in each instance on January 27 or 28 or 1971.

(6) Attorney Murray Love offered the same excuses and legal reasons for not appearing at the trial of the two within matters on both cases.

(7) The cases, the *Duquesne Brewing Company* cases and the *Budget Laundry* case, were both argued together before the local Court *en banc* during the early Spring of 1971. See Opinion of Judge Silvestri Silvestri attached hereto and marked "Exhibit A".

(8) Upon the refusal of the Court *en banc* to remove the compulsory non-suit in regard to the *Duquesne Brewing Company* cases and allow a new trial in the *Budget Laundry* case, simultaneous appeals were taken to the Superior Court of Pennsylvania. See Record.

(9) Before the Superior Court of Pennsylvania, the Duquesne Brewing Company cases were Nos. 543 April Term, 1971 and 544 April Term, 1971 respectively and the *Budget Laundry* case bore No. 546 April Term, 1971.

(10) The *Duquesne Brewing Company* cases and the *Budget Laundry* case were all argued simultaneously before the Superior Court of Pennsylvania on November 11, 1971.

(11) The Superior Court of Pennsylvania affirmed the judgment of Silvestri Silvestri and the Court *en banc per curiam* in all three cases, after which the counsel for the Respondents took appeal to the Supreme Court of Pennsylvania based upon the same issues. See Record.

(12) The Supreme Court of Pennsylvania, after reviewing the briefs and pleadings of the three cases, remanded the *Duquesne Brewing Company* cases back to the Court of Common Pleas of Allegheny County, while allowing argument, and leaving the way open for a different decision in the case of *Budget Laundry*.

The action of the Supreme Court of Pennsylvania in not allowing the Duquesne Brewing Company, your Petitioner, equal protection of the laws, was discriminatory against your Petitioner for the following reasons:

(1) In the event the Supreme Court of Pennsylvania upholds the trial policy of the Court of Common Pleas of Allegheny County after hearing argument and reviewing the briefs in regard to the *Budget Laundry Company* case, then the verdict for the Plaintiffs in that particular case will be upheld, while the Defendants in the *Duquesne Brewing Company* cases will be forced to undergo a trial and exposure to money damages as a result of a jury verdict. Thus, in the event the trial policy is upheld in the *Budget Laundry* case, the Defendant in that case will be penalized by the failure of its counsel to abide by the trial policy of the Court of Common Pleas of Allegheny County; however, it will not be penalized by the failure to abide by the trial policy in the *Duquesne Brewing Company* cases. Thus, the Supreme Court's forgiveness of counsel for the Plaintiffs' failure to follow the trial policy in the *Duquesne Brewing Company* cases acts discriminatorily upon the Duquesne Brewing Company because it must go back and face the possibilities of paying damages no matter what the trial policy of the Court of Common Pleas of Allegheny County is after the *Budget Laundry* case is decided.

(2) In the event the Supreme Court of Pennsylvania overrules the trial policy of the Court of Common Pleas of Allegheny County in the *Budget Laundry Co.* case, then the parties in both the *Duquesne Brewing Company* cases and the parties in the *Budget Laundry Company* case will be on equal footing and there will be no denial of the equal protection of the laws. However, pend-

ing the outcome of the Court's decision in the *Budget Laundry* case, the Duquesne Brewing Company faces the imposition of large liability penalties where it would not face such liability in the event its case was argued with the *Budget Laundry* case and the Supreme Court of Pennsylvania upheld the Trial Policy of the Court of Common Pleas of Allegheny County in both cases.

Although your Petitioner realizes that inconsistent results in similar cases is not necessarily a denial of equal protection of the laws, it believes that the issues in each of the three cases involved herein are so similar, took place so close in time, and involved the same counsel, and the same trial policy that it was a denial of equal protection of the laws for the Duquesne Brewing Company to be treated differently from the parties in *Budget Laundry* case.

WHEREFORE, your Petitioner avers that it has been discriminatorily treated by the Supreme Court of Pennsylvania and requests this honorable Court to remand the within two cases at 151 Allocatur Docket of the Supreme Court of Pennsylvania back to the Supreme Court with an Order that the Supreme Court of Pennsylvania not treat it inconsistently with its Opinion rendered or to be rendered in the *Budget Laundry Company* case at 152 Allocatur Docket

Respectfully submitted,

By THOMAS D. MacMULLAN,
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3131 United States Steel Building,
600 Grant Street,
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EXHIBIT "A"

Opinion

(Filed June 30, 1971.)

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

BUDGET LAUNDRY COMPANY,
Plaintiff,

v.

CARL P. MUNTER and JOSEPH S. DAVIS, trading as ALLIED UNIFORM AND TOWEL SUPPLY COMPANY,
Defendants.

No. 2362 July Term, 1968.
Issue No. 69463.

RONALD A. CONNOR, a minor by his guardian, PEARL CONNOR, and PEARL CONNOR, parent of said minor, in her own right,
Plaintiffs,

v.

DUQUESNE BREWING COMPANY OF PITTSBURGH,
Original Defendant,

v.

WILLIAM BOOKAMEYER,
Additional Defendant.

No. 1017 April Term, 1970.
Issue No. 74406.

CHARLES F. HARVEY, a minor, by his guardian, BARBARA A. HARVEY, and BARBARA A. HARVEY, mother of said minor in her own right,
Plaintiffs,

v.

DUQUESNE BREWING COMPANY OF PITTSBURGH,
Original Defendant,

v.

WILLIAM BOOKAMEYER,
Additional Defendant.

No. 2039 April Term, 1970.

Exhibit "A"

Before: OLBUM,* SILVESTRI and BOLTE, *JJ.*

SILVESTRI, *J.*

These two cases are before the Court on separate motions for a new trial and the removal of a compulsory non-suit. The Budget Laundry versus Munter and Davis case was tried *ex parte* and a verdict in favor of the plaintiff in the amount of $21,909.00 was returned by the jury. Defendants seek a new trial in relief of this verdict. In the Connor and Harvey versus Duquesne Brewing Company cases the plaintiffs seek removal of a non-suit entered against them when neither plaintiffs nor their counsel appeared and no testimony was offered to support their claims. Although the circumstances surrounding each case are somewhat different and will be set forth at some length later in this Opinion, the controlling principles of law are the same and thus the discussion of the issues herein is equally dispositive of both cases.

These motions raise fundamental questions as to the power and ability of this Court to establish a calendar of cases and the extent to which it can enforce that calendar and control the movement of cases. Specifically can this Court require that a case be tried at a given time despite the fact that one of the litigant's counsel is unavailable due to other commitments.

The decision in this case has important ramifications for the Bench and Bar in this County and may well be determinative of whether this Court has the power to clear the congestion which threatens to bring chaos to our system of

* Judge Olbum heard the oral arguments but died on June 18, 1971, before he had an opportunity to consider this opinion.

justice and whether this Court can restore confidence in our system of justice, confidence that is necessary for the effective function of government.[1]

In order to understand the basis of this decision, it is first necessary to trace the history of a lawsuit in our Court from the time it is first filed in the office of the Prothonotary, to the trial list and final disposition.

After a complaint has been filed in the Prothonotary's office, all pleadings completed and preliminary motions and objections disposed of a case may be placed on the issue docket by the praecipe of either party sixty (60) days from the date of service of the original complaint at which time it is given an issue number.[2] Once a case has been placed at issue it is listed for a pre-trial conciliation.[3] After the

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[1] The Supreme Court of Pennsylvania has recently called for a searching examination and reappraisal of our judicial processes and systems in order to restore this lost confidence. *Comm. ex rel. Carroll v. Tate,* 442 Pa. 45, 55 (1971):

> "The confidence, reliance and trust in our Courts and in our Judicial system on the part of the Bench and the Bar as well as the general public, have been seriously eroded. We cannot permit this to continue. In order to improve and expedite Justice, it is both important and imperative that we re-examine and re-evaluate our courts and their administration, our Judicial processes and our entire judicial system."

and in the concurring Opinion of Justice Pomeroy at 63:

> "The imperative reexamination which the Court has called for is, as I view it, one which must engage the attention and energy of all branches of government and of the public as well, but remain a principal preoccupation and responsibility of the members of the judiciary, particularly this Court, and for the bar."

[2] Local Rules of the Allegheny County Common Pleas Court 214*(h) ISSUE DOCKET—Appendix B.

[3] Local Rules of the Allegheny County Common Pleas Court 212*I-C—Appendix A.

date is set for the pre-trial conciliation conference there can be no further discovery proceedings except by leave of court; the parties are required to file a statement listing all items of special damage, the names and address of all persons who may be called as witnesses, and all medical and other expert reports.[4] Therefore, when a case is placed at issue then scheduled for pre-trial conciliation it is a representation by the parties that the case is ready for trial, that discovery has been completed, the issues have been formulated and the witnesses are prepared to testify.

A master conciliation list is prepared from those cases at issue for pre-trial conciliation in a manner designed to allow all counsel an opportunity to receive an equitable share of cases and so as not to create a conflict of time for the attorneys at conciliations. Approximately five hundred (500) cases are placed on this list and assigned to ten (10) judges to hear in a four (4) to five (5) day period. The master conciliation list is published sixty days (60) in advance of the conciliation date.[5] In addition, approximately thirty (30) days in advance of the conciliation date, each attorney who has entered his appearance is notified by mail that his case is scheduled for conciliation, the name of the judge before whom the conciliation is to take place, the date and the time of day.[6]

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[4] Local Rules of the Allegheny County Common Pleas Court 212*V and VI—Appendix A.

[5] The list contains the caption, term and number of the case and the names of attorneys representing parties involved in the case. The names of attorneys are taken from their formal written appearances or if they have not filed a written appearance from pleadings which have been entered in the case.

[6] Local Rule of the Allegheny County Common Pleas Court 212*II—Appendix A.

Exhibit "A"

Those cases which are not settled or otherwise disposed of at conciliation are referred back to the calendar control clerk for placing on a ready trial list. Such cases will normally appear on the second or third jury trial term following the conciliation all of which the trial bar is aware. A master trial list is prepared from cases referred to trial from the conciliation list taking those cases with the lowest issue number while at the same time taking care to be sure that all counsel receive an equitable share of cases and that there is as little conflict as possible with individual attorneys on each day's listing. The list is prepared and conflicts are reconciled on the basis of the attorney whose name is on the pleadings or whose appearance has been formally entered. The cases are not selected solely on the basis of their issue number because individual counsel or firms often have several consecutive issue numbers. The selecting of cases for the master trial list is a difficult task; to keep cases from the list simply because an individual attorney or firm has a large number of cases awaiting trial can mean that opposing counsel will have his case delayed an inordinate time even though he and his witnesses may be available and anxious to have the case decided. On the other hand, to list a large number of cases from any one firm or individual would work a hardship on the trial bar in general and only a few firms or attorneys would have their cases on the list and others, in particular individual attorneys with only a few cases in their office would have to bear interminable delays.

The master trial list is published sixty (60) days prior to the jury trial term during which the case is to be tried,

setting forth the day it will appear on the daily trial list.[7] At the time of the publication of the master trial list there is also published a statement of this Court's policy in regard to the disposition of cases on the list. This "Trial Policy" reflects the Court's belief that a major reason for the backlog in our metropolitan courts is delay on the part of trial counsel, a delay caused either because they have too many cases in their office and insufficient counsel to handle them, or because the cases have not been adequately prepared, witnesses are not available, or medical experts are unable to find the time in their own schedules to appear for the trial. That policy is as follows and provides that cases on the list will not be continued because counsel or one of the persons necessary for the trial will not be available.

TRIAL POLICY

The following will be applicable to both plaintiff and defense counsel on all cases published:

1. Counsel as listed for the case must be available and ready to try the case at the time it is called;

2. If listed counsel is not available for whatever reason then they must be substituted for;

3. If a firm does not have sufficient trial counsel to substitute, provision must be made to obtain other trial counsel;

---

[7] The list contains the caption, term and number of the case and the names of attorneys representing parties involved in the case. The names of attorneys are taken from their formal written appearances or if they have not filed a written appearance from pleadings which have been entered in the case.

4. If listed counsel is not available and no substitute provided, the case will proceed without counsel;

5. The foregoing will apply regardless of the direction or desires of the corporate or individual client;

When the list of cases is first published it is the duty of your firm to double check the readiness of your cases as to bills, reports etc. and the availability of witnesses, doctors, experts, etc. involved in the case.

When it is ascertained that any person necessary for the trial of the case may not be available during the trial term then the deposition of that person for use at trial must be taken forthwith.

No continuances will be granted for out of town business trips, vacations, etc. or any absence during trial terms of either counsel or persons necessary to the trial of the case or failure to comply with any of the foregoing.

When counsel is called to pick a jury, failure to appear within 15 minutes will result in a clerk picking the jury and the case being sent to trial without counsel.

PRE-TRIAL MOTIONS

The Calendar Control Judge will receive all uncontested motions relating to discovery and amendment of pleadings each morning in courtroom No. 7 following the call of the daily trial list.

All contested motions relating to discovery and the amendment of pleadings will be heard on Friday afternoons at 1:30 o'clock only.

Exhibit "A"

Approximately five hundred (500) cases are placed on the master jury trial list for each jury trial term. At the beginning of the jury trial and on each day thereof a daily trial list is published. Depending upon factors such as the number of cases settled, when they settle, the length of time required to try a case, the availability of judges, jurors and courtrooms a particular case may not be called for jury selection or actual trial from one to ten days after it appears on the daily trial list. A fact which the trial Bar is well aware.

The foregoing applies to all cases, however, at any time prior to publication of the master trial list, if in a particular case there are numerous parties, complex questions of law or fact and the trial of the case will be protracted the calendar control judge on his own motion, or upon application of any party or at the motion, or upon application of any party or at the suggestion of any other judge before whom the case may have come, it may be designated a "Complex Case" and assigned to a specific judge who will preside over all matters pertaining to the case in order that the numerous parties may be accommodated and the case most effectively handled by this Court. There are special rules governing the handling and disposition of "Complex Cases".[8]

In order to maintain the procedures outlined above and facilitate the efficient running of the trial list it is necessary to rely on the only source of knowledge this Court has in determining what attorney will be responsible for the trial

[8] Local Rules of the Allegheny County Common Pleas Court, 212*VII—Appendix A.

of the case; the names as they appear on the pleadings and written appearance of counsel. No other attorney is recognized as representing a party until and unless this Court is notified of a change in counsel, a change which this Court will permit only if it does not result in a delay of the trial or other disposition of the case.

The objective of these rules is to ensure that all parties and counsel have adequate notice of the scheduling of the trial of their lawsuit and that they must be prepared for their day in court under any circumstances. Therefore, when a case is placed at issue, scheduled and heard at pretrial conciliation and if not then settled and is published on the master trial list this Court has the right to assume that the case is ready for trial and that all parties and counsel are prepared to proceed to trial.

These policies are made necessary and are strictly enforced in large parts because of the concentration in a few law firms and individual lawyers of the bulk of litigation before this Court and the limited number of judges available to hear jury trials. Preparing a trial list is thus three dimensional, not only must scheduling conflicts be reconciled between counsel for plaintiff(s) and defendant(s) but for cases within the same office and with a view toward the number of judges normally available during a trial term. For example, based on the number of appearances in all cases *at issue* as of April 26, 1971, the following breakdown appears:

Exhibit "A"

Table of Appearances

Plaintiff

Number of Appearances	Number of individuals or firms who have entered an appearance in a corresponding number of cases
200-250	1
150-199	0
100-149	4 (including the firm of Sikov & Love—counsel for movants herein)
75-99	5
59-74	18
25-49	31
10-24	91
5-9	75
1-4	287

Defendant

Number of Appearances	Number of individuals or firms who have entered an appearance in a corresponding number of cases
600-700	1
500-599	2
400-499	1
300-350	3
200-249	3
150-199	2
100-149	3
75-99	2

Exhibit "A"

50-74	4
25-49	15
10-24	35
5-9	65
1-4	304

With this high concentration of cases in a few firms and individuals, firms which often employ only a limited number of trial attorneys, it is an extremely difficult task to dispose of cases while not creating conflicts and at the same time moving the trial list.

It also must be remembered that these figures represent only those cases which have actually been placed at issue. They do not include cases in which summons or complaints have been filed or claims in an office which have not reached the formal lawsuit stage. The picture is also complicated in that several offices represent both plaintiffs and defendants. Therefore, in preparing the trial list of the calendar control clerk must balance the interest of individual firms in seeing that enough of their cases appear on the list but not more than they are able to handle, as well as the interest of opposing firms in making up the calendar. These rules were designed to make that task possible while at the same time reducing the tremendous backlog of cases before the Court.

It might be possible for this Court to cater to the other commitments of every attorney who practices before it and the availability of lay and expert witnesses if we had an unlimited number of judges, courtrooms, juries, clerks, etc. However, such is not the case. In Allegheny County we have thirty-one (31) judges in the Common Pleas Court.[9]

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[9]The separate courts of Common Pleas were abolished by the new judiciary article and vested in one Court of Common Pleas, Pennsylvania Constitution, Art. V. Sec. 4.

Exhibit "A"

Four (4) of these judges are assigned to the Family Division, four (4) to the Orphans Court Division, six (6) to the Criminal Division and seventeen (17) of the Civil Division. In the Civil Division which hears all civil cases other than those initially heard in arbitration but also hears appeals from arbitration, summary offenses and administrative agencies, there is the President Judge of the Common Pleas Court whose time is limited because of administrative problems and rightly so, but still limited to the extent that he cannot hear jury trials; another judge is assigned to the assignment room to hear daily motions and petition;[10] one is assigned to hear tax appeals, one is assigned to hear non-jury appeals from arbitration and other civil actions where the parties agree to be heard non-jury, one hears summary appeals and appeals from administrative agencies and assists the Family Division and finally two (2) judges are assigned to calendar control with one (1) directly responsible for the movement of the trial list although the two (2) together conciliate each case prior to the selection of the jury for that case. This leaves at the maximum ten (10) judges who can hear *jury* trials. By reason of health; personal obligations, prior commitments, complex cases, equity cases and opinions this number during a given jury trial term is reduced even further. We have, however, managed to average eight (8) judges during a trial term to hear jury cases, including the occasional services of a senior judge. This limited number of judges must dispose of more than five hundred (500) cases during each five (5) to six (6) week jury trial term.

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[10] Local Rules of the Allegheny County Common Pleas Court 249*1—Appendix C.

Exhibit "A"

In order to reduce the backlog confronting this Court as many of the cases on the trial list as possible must be disposed of once and for all. If an attorney particularly one representing a firm with a large number of cases, requests a delay or a continuance this has a direct effect on the movement of the rest of the trial list. A continuance or delay granted to one attorney means that opposing counsel is also delayed and other cases in which he may be involved are also delayed. In addition, other cases in the office of the attorney requesting the delay are put back as he can only be scheduled for a limited number each time. The Court may be able to compensate for or minimize continuances and delays by placing fewer cases on the list for trial each term. However, this would mean that fewer cases would be disposed of not only because they would not have an opportunity for a jury trial but because they cannot be settled without the pressure of imminent trial. Thus, not only are cases that actually require a jury trial delayed but additional cases which would settle due to the imminence of trial are delayed which tend to clog the court calendar. Our figures show that from the master trial list we will settle a minimum of sixty-five (65) percent of the cases through pre-jury selection conciliation and that of the balance a minimum of twenty (20) percent will settle at various stages from jury selections to just before verdict. It is a matter of judicial knowledge that cases do not settle unless the parties are told and know that they are going to trial and that the only way that we can require them to go to trial is to insist that counsel be substituted for when for some reason counsel of record is not available. Therefore, in order to keep the trial list moving, it cannot be enlarged to the point where counsel know their case may not be reached

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nor can we permit their non-availability due to other commitments to delay the disposition of the case. The length of the delay is of serious consequence whether it be one, two or three days. To withold a case from trial for any amount of time to await one counsel in another trial in our court or a sister court while it may superficially sound like a reasonable request, when viewed from the number of cases and attorneys we have to deal with even making such allowance for one attorney would stack up the list because it means that the opposing attorney, parties and witnesses would have to wait for him to finish and that an attorney who is thus waiting has other attorneys anticipating his availability and other attorneys, parties and witnesses waiting for the third attorney and so on. One can readily see the pyramiding backlog in the case of delay involving only case, to do so for all attorneys in the same situation would make it impossible to conduct an orderly trial list.

We have briefly alluded to the problem of court backlog and what causes it and the literature is full of articles decrying the problem and setting forth suggested solutions.[11] Many factors contribute to the backlog in our Civil Courts. Commencing lawsuits by Writ of Summons just prior to the expiration of the statute of limitations then waiting an inordinate length of time to file a complaint; filing dilatory pleadings, over-estimating the value of a claim (claimants or plaintiffs' attorney); failing to comply with discovery proceedings or submit required reports or appear for medical examination; by injecting non-existing or spurious defenses; by shunting aside the "small" case or the case of

[11] See *Carroll v. Tate, supra*, at 64 and the concurring opinion of Justice Pomeroy, NN 2, 3, 4 for an excellent collection of articles dating back to 1906.

tenuous liability in favor of "better" cases; by joining multiple additional defendants who are not actually involved; by undervaluing cases (defense firms or insurance carriers); by parties and witnesses who remove themselves from the jurisdiction for various reasons notwithstanding they know their cases are pending on the trial list and attorneys and firms resisting suggestions that they employ additional trial counsel despite the fact they continuously seek delays because of other commitments and for reasons of vacation, health, and personal problems. Doctors and other experts also add to the problem by being unwilling to cooperate on legal matters or contending they are too busy because of their own affairs. Judges are not without blame, judicial administration is an unknown art and our courts have for too long languished under archaic procedures designed for a day long gone, and while the majority of judges are hard working and adequately trained some by reason of background, age and health, cannot bear the full burden of the work of a modern trial judge. Others are often swept up in petty administrative details which could adequately be handled by trained clerks if they were available and many judges find it difficult to keep their chambers open to attorneys seeking assistance. Delay can also be attributed to our inadequate Rules of Procedure which build delay into the system.

In his address to the First National Conference on the Judiciary on March 11, 1971, President Nixon using an old maxim and emphasizing the need to eliminate delays in bringing criminal cases to trial said that "Justice delayed is not only justice denied—it is also justice mocked, and the system of justice undermined". The same is true of justice in our civil courts where delays are often longer and just

as cruel. Chief Justice Burger at the same conference made this remark relative to the efficient administration of justice:

> "Independent of what we do in the courtroom itself, we need careful study to make sure that every case which reaches the courtroom stage is there only after every possibility of settlement has been exhausted. Those parties who impose upon the judicial process and clog its functioning by carrying the cases through jury selection before making a settlement which could have been made earlier should be subject to the risk of a very substantial discretionary cost assessment at the hands of the trial judge who can evaluate these abuses of the system. Someone must remind the bar and the public of the enormous cost of a trial."

It is the objective of our trial policy to encourage settlement of disputes which do not have to go to trial and as noted above this can only be done when parties know that a trial is imminent as the risk of an adverse decision by a jury or the expense of jury trial is normally the deciding factor in whether or not a case will be settled.[12]

It is the particular duty of the judges of this Commonwealth to lead the attack on court backlog and delay in individual cases if we are to have any hope or reform:

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[12] "The Court backlog is not primarily a trial problem but is a settlement problem. Therefore, the principal area toward which attention should be directed is to devising better methods for bringing a case to the point of settlement. Increased motivation for settlement should be provided to litigants and increased power given to the court and to the parties to impose some sanctions on those litigants who refuse a reasonable settlement." Remarks of Gilbert J. Helwig, President, Academy of Trial Lawyers of Allegheny County to Legislative Task Force on Court Backlog.

Exhibit "A"

". . . [D]espite widespread pessimism about our ability to cure the ills of the courts progress is possible when judges are willing to experiment and support changes." 57 A. B. A. Journal, 228 "Are Courts Going the Way of the Dinosaur?" Tamm, Judge of the United States Court of Appeals for the District of Columbia.

The Pennsylvania Legislature has recognized this duty and has provided a mandate to the judges of the Supreme Court and Courts of Common Pleas to see that all actions in their respective courts are reached and have a fair *opportunity* of a trial within one year after they are commenced:

"Causes to have opportunity for trial during year; penalty for judges' neglect.

"It shall be the particular duty of the judges of the supreme court and judges of the courts of common pleas, to see that all actions in their respective courts shall be reached and have a fair opportunity of a trial, at least within one year after they shall have been commenced; and if the judges of the supreme court, or the presidents or associate judges of the court of common pleas, or any of them, shall refuse or neglect to perform the duties enjoined on them by this act, it shall be deemed misbehavior in office, and lay a sufficient ground for the removal of the judge or judges so offending." 1806, Feb. 24, P. L. 334, 4 Sm. L. 270, § 22, 17 P. S. § 895.

In order to meet this duty this Court must have control of its calendar; it cannot be subject to the individual problems and case load of every member of the Bar. The law exists primarily to preserve social values through the order-

ly resolution of controversies, the individual litigant is merely instrumentally whose activities and relations with others create rights, duties, privileges and immunities which must be given legal effect in the interests of the community. That is not to say that the law cares nothing for people as people, but it seeks only to regulate their conduct, not to deal with personal stresses and conflicts; to that end individual litigants, attorneys and witnesses must learn to comply with rules of this court designed for the orderly and efficient administration of justice and the speedy resolution of controversies not as a service to individual litigants but to the society as a whole.

With the foregoing as background we now address ourselves to the individual cases and the facts and issues of record now before us. First are the cases of Connor versus Duquesne Brewing Company and Bookameyer, 1017 April 1970 and Harvey versus Duquesne Brewing Company and Bookameyer, 2309 April, 1970 in which the plaintiffs, through their attorney, Murray S. Love of the firm of Sikov & Love have filed motions for a new trial. The complaints in both cases are identically the same except as to the party plaintiffs and arise out of the same set of circumstances. In fact both could have been brought originally in one action. The Complaint in the Connor case was filed on February 5, 1970, and in the Harvey case a month later, March 10, 1970. The plaintiffs both minors, were passengers in an automobile which collided with a coal pile which had been placed in the highway by the defendant. Both complaints contain separate counts on behalf of the parents of the said minors and were signed by F. Regan Nerone, Esq., an attorney with the firm of Sikov & Love. Apearances on behalf of the defendant were entered by C. Donald

Gates, who filed a complaint to join William Bookameyer, the driver of the automobile, as an additional defendant. Each pleading after the complaint in the Harvey case on behalf of the plaintiff bore the signature of William Berger, Esq., another attorney in the offices of Sikov & Love. In the Connor case all pleadings other than the complaint and praecipe for issue bear the signature of William Berger, Esq. The Connor case was placed at issue on March 31, 1970. On October 9, 1970, both cases pursuant to our mass conciliation procedure were conciliated before Judge Ellenbogen. Although the record is not clear as to the attorneys who appeared at conciliation before Judge Ellenbogen it does appear that the pre-trial conciliation statement required by our Rules was signed by William Berger, Esq. The cases were not settled and were returned ready for trial together with an order dated October 14, 1970, consolidating the cases for trial.

On December 8, 1970, both cases were published in the Pittsburgh Legal Journal on the master trial list for January 19, 1971. At that time William Berger, Esq. was listed as counsel for the plaintiffs, he being the only attorney whose name appeared on all pleadings for the plaintiff. On January 18, 1971, the cases were again published on the daily trial list. On January 19, 1971, at the call of the daily trial list Thomas D. MacMullan, Esq., was substituted as counsel for C. Donald Gates for the defendants. On January 20, 1971, the cases were conciliated before Judge McLean with William Berger, Esq., as attorney for the plaintiff. On January 25, 1971, the Court was informed that only Murray Love, Esq. could try the case as counsel for the plaintiffs. On January 27, 1971, the consolidated Connor and Harvey case was ready for

jury selection and it was announced to the court by Mr. Sikov of the firm of Sikov & Love that only Murray Love could try the case and that he was then before Senior Judge Lansberry of our Court and was next scheduled for trial in the United States District Court. This Court ordered the selection of the jury in its normal turn and the jury was selected without Murray Love or any other attorney from his office in attendance. Defense counsel was present at all times. On January 28, 1971, the cases were sent to the courtroom of the Honorable David Olbum for trial, again no one appeared on behalf of the plaintiffs except Mr. Sikov to object to the proceedings, who upon being overruled retired from the courtroom. Counsel for defendants appeared and was ready to proceed. Neither plaintiffs nor counsel for the plaintiffs appearing, defendants' motion for a compulsory nonsuit was granted. The record fails to disclose that either party made application to have the cases designated "Complex" pursuant to Rule 212*VII nor did Judge Ellenbogen or Judge McLean suggest at the conciliation of these cases that they should be designated "Complex".

The Budget Laundry case in which the firm of Sikov & Love were counsel for the defendant was commenced by a complaint in assumpsit on May 17, 1968, wherein attorney Louis Vaira represented the plaintiff.

The essence of the complaint is that the defendant breached his contract for the receipt of certain services and the lease of particular property and that the plaintiff had incurred damages for rent and lost profits or in the alternative a sum to be measured by a liquidation clause in the contract in the amount of $15,000.00. The defendants

filed an answer, new matter and counterclaim denying the averments in the complaint and alleging that the plaintiff had breached the contract in that the services were performed in an unworkmanlike manner and that conditions on the rental premises forced the defendant to seek another location and that their breaches resulted in damages to the defendant in the amount of $100,000.00. At this point it is interesting to note that Carl P. Munter as a plaintiff had by attorney Frank Reich[13] commenced an action against Budget Laundry by a praecipe for a Writ of Summons at 2790 January, 1965, on December 4, 1964, which was served on Budget Laundry as defendant on December 30, 1964. On January 26, 1965, Budget Laundry as defendant by its attorney obtained a rule to file a complaint. The Complaint was not filed until October 9, 1968, three (3) years later, at which time Murray Love appeared as attorney for Munter. Munter's complaint sets forth the identical facts set out in the answer, new matter and counterclaim of Munter and Davis to the complaint filed by Budget Laundry. Preliminary Objections by Budget Laundry to the complaint of Munter were filed on October 25, 1968. (The preliminary objections were not praeciped for the argument list and are still pending).

On October 23, 1968, Budget Laundry placed its case at issue.

On March 1, 1970, the case wherein Budget Laundry is plaintiff was listed for mass conciliation before Judge Ellenbogen. Attorney Love requested that the conciliation be continued for the reason that the Budget Laundry case

[13] Attorney Frank Reich died on May 19, 1969.

against Munter and Davis should be consolidated with the Munter versus Budget Laundry case and for the further reason that Mr. Munter was out of the city and that Mr. Love as counsel for Munter had been unable to adequately prepare a pre-trial statement; this, despite the fact that Murray Love filed a complaint on behalf of Munter versus Budget Laundry in October of 1968. In his request for consolidation he stated that his answer to the claim of Budget Laundry was in essence the claim on behalf of Munter versus Budget Laundry.[14] The cases were consolidated. On September 4, 1970, the cases were again listed for conciliation before Judge Bolte. Not settled, they were returned to calendar control marked ready for trial. On December 8, 1970, the cases were published in the Pittsburgh Legal Journal for the daily trial list of January 19, 1971. It is to be noted that the Connor and Harvey cases and the Budget Laundry cases were both scheduled on January 19th, the information that the Court had was that William Berger was attorney of record in the Connor and Harvey cases and Murray Love was the attorney of record in the Budget Laundry cases. This was done consistent with our scheduling procedures so as not to schedule the same attorney for more than one case on the same day. Had the Court known a sufficient time prior to publication of the master trial list that Murray Love was the actual counsel on both cases the consolidated Connor and Harvey case would not have been scheduled on the same day as the Budget Laundry cases. The Budget Laundry cases were

[14] The case of *Munter v. Budget Laundry*, 2790 January 1965 is a classic example of many of the elements which contribute to the backlog, tarnishing the image of the courts in the eyes of the public when in reality the delay is attributable to the attorneys and not the courts.

called on the daily trial list on January 19, 1971. On January 27, 1971, when the cases reached their turn for selection of a jury the firm of Sikov & Love was advised of the necessity of their presence.[18] Mr. Sikov again stated that the cases could only be tried by Murray Love who was then before Senior Judge Lansberry and was next scheduled for trial in the United States District Court. Mr. Sikov appeared specially on behalf of the defendants to object to the selecting of the jury *ex parte* but was overruled. No one appeared to examine the jurors for the defendants, however, counsel for the plaintiff was present. On January 28, 1971, the case was sent to the courtroom of Judge Bolte for trial; neither defendants nor their counsel appeared. Again Mr. Sikov appeared specially on behalf of defendants to object to the *ex parte* proceeding which was overruled. The plaintiff put in its case and a verdict was returned in its favor in the amount of $21,909.00. At no time was application made to designate this a "Complex Case" nor did Judge Ellenbogen or Judge Bolte at their conciliations of the cases indicate that these cases were "Complex Cases".

DISCUSSION.

When Mr. Sikov appeared specially on behalf of Mr. Love and again at the argument on the motions several facts were set forth which do not appear of record and which this Court had no way of ascertaining. It was movants' contention that the requested delay should have been granted because there was only one counsel familiar with the cases namely, Mr. Love, that Mr. Berger had been listed as

[18] The case instituted by Munter against Budget Laundry at 2790 January, 1965, was severed because of the pending preliminary objections.

trial counsel in the Harvey and Connor cases erroneously and that the delay would only be for a matter of hours or a few days. This Court rejected those arguments when the continuances were requested as it does now as they were unsupported by anything in the record and in fact the contrary is indicated by the record. In both cases it appears that the bulk of the preliminary matters including settlement negotiations were done by attorneys other than Mr. Love and that they were equally familiar with the cases and equally competent to try them. This Court also had no way of knowing the extent of the delay whether it would be one hour or one month. Mr. Love's case in the United States District Court was a multi-party action[18] and the trial had been specially set. It is Mr. Love's contention that it is the duty of this court to arrange with the United States District Court to release attorneys of their obligations before that body.

Stripped of these allegations the contentions of the movants appear as follows:

1. The Court committed prejudicial error and an abuse of discretion in applying its Trial Policy to these cases and in refusing the oral motion made on behalf of counsel for the movants to delay the commencement of the trials until movant's counsel was available to try the cases.

2. The Court committed prejudicial error and an abuse of discretion in requiring the jury to be selected and the cases to be tried *ex parte* and without the presence of counsel either during selection of a jury or during trial.

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[18] As noted in movants' motion for new trial and removal of the non-suit.

Exhibit "A"

3. The Court committed prejudicial error in that it is a violation of due process of law to refuse to permit movants to have counsel of their choice and in requiring them to substitute council.

4. That the Court violated movants' right of due process of law and equal protection of the laws under the Constitution of the United States and under the Constitution of the Commonwealth of Pennsylvania by refusing to delay commencement of the trials to permit movants' counsel to complete a trial before a Senior Judge of this Court and a trial to be commenced in the United District Court.

We have already set forth the reason for this Court's refusal to delay cases on the jury trial list. Specifically in this situation if we were to accede to the wishes of Mr. Love it would cause inconvenience and delay of two other counsel, the witnesses and parties connected with both cases, judges, tipstaves and clerks of this Court to await his completing a case and then go to the United States District Court to try another case. This in turn causes the pyramiding effect of delay in cases awaiting opposing counsel and could in fact result in a later conflict with other cases on the list of opposing counsel so that other cases would have to be removed entirely from the trial list.

It is movants' contention that the policy of no continuances and substitutions of counsel is arbitrary and unreasonable. In support thereof they cite the case of *Nerkowski v. Yellow Cab Co.*, 117 P. L. J. 285 (1969) reversed 436 Pa. 306 (1969), in which the application of similar rule was found to be the abuse of discretion. In addition,

they contend that this policy can only reasonably be applied where there has been a long history of continuances and delay and that such was not the situation in these cases.

It is firmly established that a court has the inherent power to dismiss cases that have remained dormant because of dilatoriness or inaction, *Link v. Walbash Railroad Co.*, 370 U. S. 626 (1963):

> "The power to invoke this santion is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Court." *supra* at 629.

In addition, it is also well settled that a Court can make rules regarding the efficient disposition of claims before the court in fact that the court has a duty to provide such disposition as noted above.[17] Because the public welfare requires a person to assert his claim within a specific time or even in a specific manner, or else lose it, is no basis for a contention that he has been deprived of property without due process of law. *The state has the unquestioned right to cut off litigation;* to enact statutes of repose; to fix a time beyond which claims cannot be asserted in the Courts. Reasonable conditions may be imposed as a condition of a hearing. Just because a rule of procedure may work particular hardship on a particular party does not make the rule wanting in due process.

The only requirement upon such rules is that they be reasonable and provide for an "opportunity" for a hear-

[17] "Courts" Act of Feb. 24, 1806 P. L. 334, 4 Sm. L. 270, § 22 *supra*, at page 131a of this opinion.

ing upon the merits. *Armstrong v. Monzo*, 380 U. S. 545 (1965); *Schroeder v. New York City*, 371 U. S. 208 (1963). States may generally set the terms on which they will permit litigation in their courts, so long, at least, as the conditions are reasonable. It is only the unreasonable restraint upon the right of access to the courts which is violative of due process of law and unconstitutional. It is only when restraints upon access to the courts is "arbitrary, unequal and oppressive" so as to shock the sense of fairness that the Fourteenth Amendment was intended to apply. *Chicago & N. W. R. Co. v. Nye Schneider Fowler Co.*, 260 U. S. 35 (1922).[18]

The published trial policy of this Court is clearly not unreasonable and its application in these cases is not an abuse of discretion. In the first instance these cases are not free of the delay or lack of prosecution claimed by movants as necessary for any deviation from the rules and policy of this Court. In the Budget Laundry case litigation concerning the facts of the case was actually instituted in 1964 and through movants' own delay a complaint was not actually filed until four (4) years later and no further action was taken until a new suit was instituted by Budget

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[18] The requirements of due process have recently been reiterated by the Pennsylvania Supreme Court in the case of *Conestoga National Bank of Lancaster v. Patterson*, 442 Pa. 289 (1971):

> "'Due process of law', while incapable of exact definition, generally means 'law in the regular course of administration through courts of justice, according to those rules and forms which have been established for the protection of human rights:' . . . Its essential elements are 'notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause:' . . . *supra* at 295."

Laundry and in fact the first case is still pending as hereinbefore noted. In addition, the case had already once been continued because of lack of preparation on the part of movants. The Connor and Harvey case had already been at issue almost a year and had been delayed by the original failure to bring the Connor and Harvey case together in one suit and the evential consolidation of the two cases. Secondly, while a hardship may be created in these cases a greater hardship is created for opposing counsel and for others whose case could not be reached on the trial list or who might be delayed not to mention witnesses, experts, etc. who would again have to readjust their schedules, all this for the sole purpose of accommodating one attorney. The test of whether a rule or policy is unreasonable is not whether it creates a hardship in a particular case but whether it creates such a restraint upon access to the Courts that it is violative of due process. The movants in this case have had their opportunity for a day in Court. It is not our concern that because their counsel decided another case was more important or because they would accept no other counsel that they were unable to avail themselves of it.

The *Nerkowski* case, *supra*, while it concerns a similar policy and rule of this Court is distinguishable on its facts. In addition, the case did not find the trial policy there, which is similar to the one now being used by the Court, unconstitutional. That case was found to involve complicated medical testimony and the unavailability of counsel[19] which was totally unanticipated and uncontrollable by the

[19] Counsel in that case was appointed to fill a vacancy in the Common Pleas Court of Allegheny County.

parties or counsel so that they could not have notice that counsel would not be available to try the case. In these cases before us there is no indication of any complex factual or legal questions. The complaints in the Harvey and Connor case were the same. The injuries sustained were not extensive, the complaint in the Harvey case stated "the minor plaintiff sustained injuries to the left foot, and facial lacerations, and the muscles, ligaments, tissues, tendons and nerves in, about and extending from the left foot were strained, torn and dislocated." In the Connor case the plaintiff sustained "a fractured jaw, injuries to the teeth, lacerations on the neck, lips, and face, and the muscles, ligaments, tissues, tendons and nerves in, about and extending from the aforementioned portions of the minor plaintiff's body were strained, torn and dislocated." In addition, it appears that other counsel were familiar with the case. William Berger not Murray Love prepared all the relevant and pertinent pleadings in the case including pre-trial statements, and it was William Berger who appeared on the trial list as counsel who was to try the case and it was William Berger who appeared before Judge McLean for Conciliation of the cases prior to jury selection.

Movants' second argument is that it was an abuse of discretion to require the cases to be heard without counsel or their clients being present. This is clearly a falacious argument. In the first place, this Court, did not require that the case be tried by a jury selected *ex parte*. the only requirement of this Court is that it be tried when a jury, judge and courtroom are available. It was movants' choice not to appear or substitute counsel.

Exhibit "A"

There is no due process requirement that a party be accorded a jury trial at the parties convenience or the convenience of his counsel the only requirement being that he be given notice and opportunity for a hearing. It is true that the Pennsylvania Constitution provides for a jury trial in civil cases but it does not mean that the rules and regulations regarding when and where the trial shall take place cannot be established by the Court. There is no denial of due process in the mere fact that a jury trial has not been held with all parties in attendance to present their case where they had the opportunity to do so. *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U. S. 211 (1961) [Holding that U. S. Constitution does not require the states to provide jury trials in civil cases.]

Movants' third argument is that it has been deprived of a right to counsel is also without merit.

The legislature has provided that a party has a right to be heard by counsel:

> "In all civil suits or proceedings in any court within this commonwealth, every suitor and party concerned, shall have a right to be heard by himself and counsel or either of them." 1806 March 21, P. L. 558, 4 Sm. L. 326, § 9.

This right is not violated by the policy of this Court in requiring a case to be tried when called whether or not counsel is available. This Court by its policy of not granting continuances is not saying that an individual may not be represented by counsel, only that counsel be present when the court has fixed a time for a hearing of the individuals' claim. Movants' argument through their attorney

is that they have retained the services of Murray Love because of a reputation built over 15 years as a competent trial counsel, that they have a right to choose a particular counsel and that no other attorney was competent at the time fixed by the Court to try their case. In addition, counsel argues that it will deprive them of their livelihood and the right to practice their profession because they will not be able to handle as many cases if they are forced to try their cases whenever scheduled.

It is this Court's opinion that even assuming there is a right to a choice of counsel in civil cases and we are not certain that such a right is required by due process of law[20] that right must be tempered when it causes delay in the trial of cases. No attorney admitted to the bar of the Court has the right to be counsel of record for more clients than he can properly represent without causing unnecessary, excessive and undue delay of the trial of cases of the litigants he represents or of other litigants in this court. The lawyer is an officer of the court and to that end it is his primary duty to serve the court and the public and not his own interests. *Sterling v. City of Philadelphia*, 378 Pa. 538 (1954) and *Nerkowski v. Yellow Cab Co., supra*, opinion of the trial judge.

The same we think is true of litigants; they do not have a right to a counsel which will cause delay in the trial of their own cases or of other cases on the list because of counsel's unavailability. However firmly rooted their right to counsel of their choice may be it does not follow

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[20] *In Re Groban*, 352 U. S. 330 (1957) and *Anonymous v. Baker*, 360 U. S. 287 (1959) holding that there is no right to counsel in civil matters required by due process.

that such a right embodies the right to have counsel of their choice try cases only when it is convenient for him to do so. The right of a litigant to counsel of his own choice must bow to the power of the Court to regulate its own calendar.

We have already noted that these cases did not present special issues of complex law or facts and that in our opinion they could be tried by any attorney qualified before this Bar.

The argument that this court is taking away counsel's livelihood is unrealistic and irrelevant to this case. The change in our society over the last 30 years has also brought a change in the method which attorneys must operate and by which individuals select their counsel. This change has been recognized by the American Bar Association in their "Code of Professional Responsibility":

"SELECTION OF A LAWYER: GENERALLY

"EC 2-6. Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

"EC 2-7. Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laymen to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and

competent to deal with every kind of legal matter, and many laymen have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers."

The function of courts in our society is as an independent branch of government existing to resolve disputes among members of society. Our judicial system belongs to the public as a whole, it does not exist so that attorneys can reap a profit or attain more clients. The attorney is an officer of the court and as such he has only a privilege conferred upon him to represent clients before the court, he does not have the right to establish the time when he will be available to the court.

In particular counsel's argument ignores the fact that the very existence of law firms is to handle a volume of legal business. This is normally done by assigning to junior partners or attorney employees cases which they handle all the way to completion and in other cases by assigning to different members and associates of the firm various aspects of the same case. In such instances the attorneys working on or handling the case did not bring the client into the firm and his only contact with the client is in the preparation and trial of the case. A personal relationship between the attorney and client for the competent handling of the affairs of the client is not requisite to the establishment of a flourishing law practice or for achieving a competence in the practice of law. The lawyer is a pro-

fessional, and since he is an officer of the Court, it is the responsibility of the Court in serving the public interest, to insist upon the attorney's being prepared and expecting no less than the highest level of professionalism from those lawyers practicing before it. That means a professionalism in his attitude to the Court as well as to his clients or a professionalism which means that he will comply with Court procedures in serving his clients.

What may have been true when we were an agrarian society and when litigation was at a minimum and due to a lack of communication and things were done at an easy pace, we now live in a frenetic world where we have a mobile complex urban society. Things are no longer done leisurely and the effect has been felt in all corners of society. Some professions such as medicine have kept up with the changing pace, it is time that the legal profession also brings itself in line with these "new" times.[21] What is sought today by litigants in this Court is not a personal relationship or hand-holding but professional integrity and the effective determination of a client's claim. This does not mean that such a relation cannot be developed, but that in the courtroom it is objectivity of facts and law which must be permitted to determine the outcome and not personal attachment.

The requirements of due process are that every person whose interests are involved in civil litigation are entitled to such notice of the pendency of the suit as is reasonably calculated to apprise him of the litigation and that he be given an opportunity to be heard.

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[21] Address by Chief Justice Warren E. Burger at the First National Conference on the Judiciary.

Exhibit "A"

> "An elementary and fundamental requisite of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950).

There cannot be any question that movants did not have notice of the pendency of their action, and the span of time within which it was to be called. A party is deemed to have notice of all facts which may be charged upon his attorney, *Smith v. Ayer*, 101 U. S. 320 (1879) and the procedure outlined at the beginning of this opinion and which was followed in these cases is designed specifically with that in mind as well as making sure that the parties are prepared in their cases and have notice that they will be tried despite outside commitments of attorneys and the availability of witnesses.

The argument that Mr. Love should be permitted a delay to try a case in the United States District Court or that in the alternative this Court should request that he be excused from that litigation does not move this Court and is in fact repugnant to it. It is true that we have had a working agreement with the District Court to avoid conflicts but we can only go so far with that agreement. It must be up to counsel to make such arrangements as are necessary and to avoid conflicts on his own behalf. In addition, in the past several years in Allegheny County, there has been an underlying feeling that the attorneys should fear the wrath of not complying with the rules and dictates of the District Court but could with impugnity disregard

the rules of the Common Pleas Court and the feeling that the District Court is somehow superior to the local courts still permeates the legal atmosphere. We hope that our stand now will restore confidence in our Common Pleas Courts and a respect for its functions among the members of the Bar.

This Court is well aware of the fact that its rules and policy have met with resistance among members of the trial bar. It is also quite evident that the vigorous enforcement of this policy has led to a more efficient disposition of cases on this Court docket[22] and a corresponding decrease in the number of pending civil cases at issue and the average age of pending civil cases at issue. The attitude among some of the Bar, however, is that the courts exist as their own personal vehicle to be manipulated to suit their schedules and the schedules of their clients and their many witnesses. As we have demonstrated this attitude can no longer be permitted to prevail if we wish to maintain a system of justice which will accomplish its avowed purpose; the orderly resolve of disputes between members of society.

It is inevitable that until there is a general understanding among the public and the Bar that in a few instances some attorneys may not be able to serve as many clients, clients which they were able to serve only at the expense of the Court and delay of their clients' claims, delays which

[22] Statistics for the four trial terms immediately following the announcement of the Court's policy show that there were *2,884* cases disposed of under the supervision of the Court. For the same four trial terms in the year preceding the adoption of the rule only *2,179* cases were disposed of while under the supervision of the Court, 25 per cent less than after the adoption of the rule.

often as not were explained to the party litigant who wanted his case disposed of as the fault of an inefficient Court. We believe, however, that in the long run the Bar, the party litigants and the public will be the beneficiaries of this policy. An efficient system of justice which provides for the prompt and immediate disposition of a case and does not destroy the value of a case by making it wait on the docket for 2-3-4 or 5 years can only work to improve the image and confidence in our rule of law which in turn will restore confidence and improve relations with the members of the Bar and the community as a whole.

Accordingly, the respective motions for a new trial and removal of the compulsory non-suit will be dismissed.

APPENDIX A.

Local Rules of the Allegheny County Common Pleas Court 212 *I, II, V, VI, VII

RULE 212.

*I. This Rule shall govern pre-trial, conciliation and trial of cases in this Court.

A. For the purpose of this Rule, "pre-trial" shall mean a type of conference described in Pa. R. C. P. 212. "Conciliation" shall mean a conference involving Court supervised negotiations designed to produce an amicable settlement. Where the expression "pre-trial-conciliation conference" appears, the conference may take the form of either a "pre-trial" or "Conciliation", or both at the option of the judge presiding at the conference.

Exhibit "A"

B. The term "party" or "parties" used hereinafter, shall mean the party or parties to the action, or his or their attorney or attorneys of record, except in those rules which require the signature or verification of the actual party.

C. All cases at issue shall be listed for pre-trial conciliation and trial at times to be fixed by the Court.

*II. Notice of the pre-trial conciliation conference shall be given all parties by mail and/or publication in the Pittsburgh Legal Journal not less than sixty (60) days prior to the conference. Notice of specific time and date for the conference shall be given not less than two (2) weeks prior thereto. Any application for continuance of the conference shall be addressed to the judge to whom the case has been assigned.

*V. After the date set for the pre-trial-conciliation conference there shall be no discovery proceedings whatsoever except by order of Court issued by the judge who is assigned to preside at the pre-trial conciliation conference, or by agreement of counsel which does not result in delay of the trial of the case.

*VI. In all trespass actions, and in other forms of action to the extent this rule may be applicable:

A. Plaintiff, within thirty (30) days after notice of a pre-trial-conciliation conference as provided in Paragraph II hereof:

1. Shall serve upon all parties a written statement containing:

Exhibit "A"

a. All items of special damages which the plaintiff intends to prove, including medical bills, property damage bills (or estimates if there are no bills) and loss of earnings. Claims for loss of earnings shall set forth the names of employers, date of absences and rates of pay. If plaintiff is self-employed, information which forms the basis for the loss of income attributable to the injuries shall be supplied.

b. The names and addresses of all persons who may be called as witnesses, classifying them as liability and/or damage witnesses.

c. Medical reports of any doctor who treated, examined, or was consulted in connection with the injuries complained of, and who may be called as a witness.

d. The reports of any expert whose opinion will be offered in evidence at the time of trial. Such reports shall include the findings and conclusions of the expert.

2. Shall file with the Prothonotary a statement containing 1. a. and b. above, and a certification over his signature that he has served upon all parties the statement and reports described in VI. A. 1. Such statement shall be called "Plaintiff's Pre-Trial Statement."

3. Shall upon request of any defendant to the extent the same has not already been accomplished:

Exhibit "A"

a. Arrange for medical examination of plaintiff by a physician designated by the defendant, which examination shall take place at such time prior to the date set for the pre-trial-conciliation conference as to make available the written report of such examination by the date of the conference.

b. Furnish defendants written authorization to inspect the records of any hospital or clinic where plaintiff was treated for the injuries or disabilities complained of, and concerning prior injuries or disabilities where the same may be relevant.

B. A counterclaimant shall be considered a plaintiff and shall comply with all applicable provisions of this Rule relating to plaintiffs.

C. Defendant, within fifteen (15) days after the time set for performance by the plaintiff under VI. A. and VI. B. hereof:

1. Shall serve upon all other parties a written statement containing:

a. The names and addresses of all persons who may be called as witnesses, classifying them as liability or damage witnesses.

b. Estimates or reports of property damage sustained by the plaintiff.

c. Medical reports of any doctor who examined the plaintiff on behalf of any defendant, and medical reports of any other doctor who treated, examined, or was consulted in connection with the injuries complained of and who may be called as a witness.

d. The reports of any expert whose opinion will be offered in evidence at the time of trial. Such reports shall include the findings and conclusions of the expert.

2. Shall file with the Prothonotary a statement containing 1. a. and b. above, and a certification over his signature that he has served upon all other parties the statement and the reports described in VI. C. 1. Such statement shall be entitled "Defendant's Pre-Trial Statement."

D. At least one week prior to the time fixed for the pre-trial-conciliation conference all parties shall confer and consult with each other as often as may be necessary for the following purposes:

1. To explore in every respect the possibility of settlement, including exchange of a good faith demand and offer.

2. To consider the factual and legal issues involved and to agree upon supplemental medical examinations, if requested, prior to the pre-trial-conciliation conference.

3. To prepare a list of all exhibits to be offered in evidence numbered or lettered consecutively and note on each whether it may be offered without proof. All exhibits shall be made available to opposing parties for inspection and copying. If any exhibits are known to exist or probably will be required but are not available at the time, the substance thereof must be disclosed to opposing parties, and numbers or letters shall be reserved for

such exhibits. If not discovered or not realized to be necessary until after the pre-trial-conciliation conference, then they must be marked before trial. The exhibit list shall be filed of record prior to the pre-trial-conciliation conference. Exhibits not submitted and marked in this manner shall not be admitted at the trial unless the trial judge is satisfied that their existence or the necessity of introducing them could not have been determined at the earlier stages referred to in this paragraph.

4. To execute a Certificate of Compliance as provided in paragraph IV. B.

E. Witnesses whose identities have not been revealed as provided in Paragraph VI. A. 1. b. and VI. C. 1. a. or whose reports have not been furnished under VI. A. 1. c. and d. and VI. C. 1. c. and d., *supra* will not, under any circumstances whatsoever, be permitted to testify at the subsequent trial of the case.

*VII. For the purpose of this Rule a case is a "complex case" where: There are numerous parties: there are complex questions of law and/or facts; the trial of the case will probably be protracted; or, the orderly administration of justice requires that one judge be assigned to it.

A. Where it appears at any stage of the proceedings that a case is a complex case, the calendar control judge on his own motion, or upon application of any party, or at the suggestion of any other judge before whom the case may have come, may

designate the case to be a complex case and assign it to a specific judge, who shall thereafter preside over all matters pertaining to the case, including trial.

B. Except as expressly modified herein, the general procedure established by this Rule with respect to pre-trial-conciliation conference shall apply to a complex case.

C. At the pre-trial-conciliation conference of a complex case the judge shall cause a record to be made, at the expense of the parties, which shall include all matters agreed upon or decided at the conference. At such conferences the parties shall make full disclosure of the theories which they intend to pursue at the trial. Failure to make such disclosure shall require the exclusion at trial of any evidence relating to an undisclosed theory.

D. After the complex case has been pretried and conciliated, a trial date shall be assigned to it by the calendar control judge after consultation with the judge to whom the case has been assigned.

APPENDIX B.

Local Rules of the Allegheny County Common Pleas Court 214 *(h).

RULE 214 *(h) Issue Docket.

The Prothonotary shall keep an issue docket and shall enter cases therein when requested by any of the

parties. The cases so entered shall receive consecutive numbers. No case shall be placed at issue until all pleadings have been filed and preliminary motions and objections disposed of. In no event shall a case be placed at issue earlier than sixty (60) days from the date of service of the original complaint upon the defendant. Cases placed at issue in violation of this rule shall be stricken from the issue docket. Such cases shall receive a new number after full compliance with this Rule.

APPENDIX C.

Local Rules of the Allegheny County Common Pleas Court 249 *1.

RULE 249 *1. Assignment Room.

(a) Except in cases of emergency, all motions, rules, petitions, and applications heard in the Assignment Room must be presented at 9:30 A. M. or at 1:30 P. M.

(b) All preliminary motions, such as preliminary objections, rules to open or strike judgments, motions for more specific pleadings, lack of capacity to sue, questions of jurisdiction, misjoinder of causes of action, or non-joinder of necessary parties shall be disposed of by the Assignment Room judge. Upon the filing of such preliminary motion or matter, notice together with a memorandum of the law relied upon, shall be given to the adverse party five (5) days before the same is to be presented to the Assignment

Exhibit "A"

Room judge. Such notice shall state the date, time, and place when the preliminary motion or matter will be presented for argument and disposition. All such preliminary motions and matter together with the proposed order shall be presented to the Assignment Room judge at a date and time obtained from the Minute Clerk and shall be accompanied by the memorandum of law served on the adverse party. If the adverse party or parties intend to present a reply brief, it must be served on the proponent of the motion one (1) day prior to the date set for presentation.

ORDER.

AND Now, this 30 day of June, 1971, after review of the records, the arguments of counsel and consideration of the briefs, it is ORDERED and DECREED that:

1. The motion for a new trial in the case of Budget Laundry Company v. Carl P. Munter and Joseph S. Davis, trading at Allied Uniform and Towel Supply Company, No. 2362 July Term, 1968 be and is hereby dismissed.

2. The motion to remove the compulsory non-suit in the case of Ronald A. Connor, a minor by his guardian, Pearl Connor and Pearl Connor, parent of said minor, in her own right v. Duquesne Brewing Company of Pittsburgh v. William Bookameyer, No. 1017 April Term, 1970, and Charles F. Harvey, a minor, by his guardian Barbara A. Harvey and Barbara A.

Exhibit "A"

Harvey, mother of said minor in her own right v. Duquesne Brewing Company of Pittsburgh v. William Bookameyer, No. 2309 April Term, 1970, be and is hereby refused.

BY THE COURT,
SILVESTRI, *J.*

Eo die, Exceptions noted and Bill sealed.

BY THE COURT,
SILVESTRI, *J.* (SEAL).

EXHIBIT "B"

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Patrick N. Bolsinger
Prothonotary

Helen D. Steele
Deputy Prothonotary

Pittsburgh, Pa. 15219
June 23, 1972

Thomas D. MacMullan, Esquire
Brandt, McManus, Brandt & Malone
31st Floor, U. S. Steel Building
Pittsburgh, Pa. 15219

In Re: Connor, a minor, etc., *et al.* v. Duquesne Brewing Company of Pittsburgh
Harvey, etc., *et al.* v. Duquesne Brewing Company of Pittsburgh
No. 151 Allocatur Docket

Dear Mr. MacMullan:

This is to advise you that the Court has entered the following Order on your Petition for Reconsideration in the above case:

"June 19, 1972

Petition denied.

Per Curiam"

Very truly yours,

PATRICK N. BOLSINGER
Prothonotary

PNB:ig
cc: Murray S. Love, Esquire

EXHIBIT "C"

IN THE
SUPERIOR COURT OF PENNSYLVANIA

No. 1045

RONALD A. CONNOR, a Minor, by his Guardian, PEARL CONNOR, and PEARL CONNOR, parent of said minor, in Her Own Right,

Appellants,

vs.

DUQUESNE BREWING COMPANY OF PITTSBURGH,
Original Defendant,

and

WILLIAM BOOKAMEYER,
Additional Defendant.

No. 543, April Term, 1971.

Appeal from the Order of the Court of Common Pleas, Civil Division, of Allegheny County at No. 1017, April Term, 1970.

Per Curiam Filed: January 13, 1972

Order affirmed.

Exhibit "C"

IN THE

SUPERIOR COURT OF PENNSYLVANIA

No. 1046

CHARLES F. HARVEY, a Minor, by his Guardian, BARBARA A. HARVEY, and BARBARA A. HARVEY, mother of said minor, in her own right,

Appellants,

vs.

DUQUESNE BREWING COMPANY OF PITTSBURGH,

Original Defendant,

and

WILLIAM BOOKAMEYER,

Additional Defendant.

No. 544, April Term, 1971.

Appeal from the Order of the Court of Common Pleas, Civil Division, of Allegheny County at No. 2309, April Term, 1970.

Per Curiam Filed: January 13, 1972

Order affirmed.

EXHIBIT "D"

Order

PETITION FOR ALLOWANCE OF APPEAL FROM THE SUPERIOR COURT

[PA 5736]

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

RONALD A. CONNOR, a minor, by his guardian, PEARL CONNOR, and PEARL CONNOR, parent of said minor, in her own right,

Petitioners,

v.

DUQUESNE BREWING COMPANY OF PITTSBURGH,
Original Defendant,

v.

WILLIAM BOOKAMEYER,
Additional Defendant.

Allocatur Docket No. 151.
(No. 543, April Term, 1971.)

CHARLES F. HARVEY, a minor, by his guardian, BARBARA A. HARVEY, and BARBARA A. HARVEY, mother of said minor, in her own right,

Petitioners,

v.

DUQUESNE BREWING COMPANY OF PITTSBURGH,
Original Defendant,

v.

WILLIAM BOOKAMEYER,
Additional Defendant.

(No. 544, April Term, 1971.)
(C. P. Civil Division, Allegheny County at Nos. 1017 April Term 1970, and No. 2309 April Term, 1970.)

Exhibit "D"

AND NOW, this 2nd day of May, 1972, IT IS ORDERED AND DECREED that Petition for Allocatur is granted and the record is remanded to the trial court with directions to remove the compulsory nonsuit and permit the case to proceed according to law.

We leave to the trial court's sound discretion the imposition of appropriate sanctions, if any, upon the offending individual or individuals involved in the delay of litigation.

Per Curiam,

.....

EXHIBIT "E"

Petition for Reconsideration

IN THE
SUPREME COURT OF PENNSYLVANIA

RONALD A. CONNOR, a minor by his guardian, PEARL CONNOR, and PEARL CONNOR, parent of said minor, in her own right,

Appellants,

vs.

DUQUESNE BREWING COMPANY OF PITTSBURGH,
Original Defendant,

vs.

WILLIAM BOOKAMEYER,
Additional Defendant.

No. 543 April Term, 1971.

CHARLES F. HARVEY, a minor by his guardian, BARBARA A. HARVEY, and BARBARA A. HARVEY, mother of said minor, in her own right,

Appellants,

vs.

DUQUESNE BREWING COMPANY OF PITTSBURGH,
Original Defendant,

vs.

WILLIAM BOOKAMEYER,
Additional Defendant.

No. 544 April Term, 1971.

To the Honorable, the Judges of said Court:

And Now comes the Duquesne Brewing Company of Pittsburgh, the Original Defendant in the above-captioned matters, by its attorneys, Thomas D. MacMullan and Brandt, McManus, Brandt and Malone and petitions this

Exhibit "E"

honorable court for reconsideration of the Petition of Charles F. Harvey, a minor by his guardian, and Ronald A. Connor, a minor by his guardian, for the allowance of an appeal from the decisions of the Superior Court of Pennsylvania, affirming *per curiam* the orders of the Court of Common Pleas of Allegheny County, Pennsylvania and in pursuance thereof, respectfully represents:

1. That your petitioner herein was the original defendant in separate causes of action in the Court of Common Pleas of Allegheny County, Pennsylvania at Numbers 1017 April Term, 1970 and 2309 April Term, 1970.

2. The above cases proceeded to trial and the plaintiffs were non-suited by the trial court in accordance with PARCP 218 for failure to proceed without satisfactory excuse being made known to the court.

3. The court *en banc* refused to take off the non-suit and their decision was affirmed after argument by the Superior Court of Pennsylvania without opinion.

4. On or about February 11, 1972, the plaintiffs petitioned for allowance of appeal from the order of the Superior Court at Numbers 543 and 544 April Term, 1971 to this honorable court.

5. On or about May 2, 1972 this honorable court ordered that the plaintiffs' petition for allocatur be granted and the record remanded to the trial court with directions to remove the compulsory non-suit and permit the case to proceed according to law. See Order of this court attached hereto and marked "Exhibit A".

Exhibit "E"

6. This court did not permit argument nor did it file an opinion with its May 2, 1972 order attached hereto and marked "Exhibit A".

7. On or about May 10, 1972 the Court of Common Pleas of Allegheny County by the Honorable Silvestri Silvestri and the Honorable Gwilym A. Price, Jr., Calendar control judges, announced and published its trial policy as a result of the May 2, 1972 order of this court pertaining to this case. As a result of this court not permitting argument nor filing an opinion the trial policy of the Court of Common Pleas has been reaffirmed and is the same as it was when the cases involved herein were first ordered to trial and were non-suited. See announcement of trial policy attached hereto and marked "Exhibit B".

8. Your petitioner respectfully requests this honorable court to permit reargument of the plaintiffs' petition for allocatur and further requests this court to file an opinion in support of its decision for the following reasons:

a) The refusal of this court to permit argument of the petition for allocatur violates your petitioner's right to equal protection and due process of law under the Constitution of the United States of America. The refusal to permit argument prevents the petitioner from free access to the court in order to explain and defend its position. The effect of the court's order of May 2, 1972 denies the defendant equal protection of the law inasmuch as the defendant has been required to follow the published trial policy of the local Court of Common Pleas; however, the plaintiff is excused. Your petitioner is further prejudiced by reason of the fact it has had to spend large sums of money for legal

fees and costs by reason of the plaintiffs' failure to follow the announced trial policy of the Court of Common Pleas of Allegheny County, which policy is still in effect as of this date.

b) The failure of this honorable court to permit argument violates due process of law inasmuch as it rendered your petitioner unable to argue erroneous facts presented in the plaintiffs' petition for allocatur and further prevented your petitioner from arguing that the facts of this case permit the affirmation of the decision of the Superior Court of Pennsylvania below on the basis of *Nerkowski vs. Yellow Cab Company of Pittsburgh*, 436 Pa. 306, 259 A. 2d 171 (1969), *Lighting Unlimited, Inc. vs. Unger Construction Company*, 217 Pa. Super. 252, 269 A. 2d 368 (1970) and *Link vs. Wabash Railroad Company*, 370 U. S. 626, 82 S. Ct. 1386 (1962). The importance of this case to the courts of this commonwealth and to the lawyers of this commonwealth merits full argument of law and facts together with an opinion inasmuch as the effect of this court's May 2, 1972 order is to reaffirm the trial policy of the Court of Common Pleas of Allegheny County which is the main question in issue throughout. Full arguments and opinion are also necessary in this case in order to establish effective and sound guidelines for the conduct of pre-trial procedure in the Court of Common Pleas of this Commonwealth. The effect of the May 2, 1972 order of this honorable court serves only to allow counsel to continuously test the pre-trial policy rules of the various Courts of Common Pleas which

means that the issues of this case will come before this honorable court many times in the future when they can and should be settled at this time.

WHEREFORE, your petitioners pray that they be allowed reconsideration of the within matter before the Supreme Court of Pennsylvania.

Respectfully submitted,

BRANDT, McMANUS, BRANDT AND MALONE,

By THOMAS D. MACMULLAN,
Attorney for Original Defendant.